Service Date: December 27, 1996

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF Western Wireless Corporation's Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 of the Rates, Terms, and Conditions of Interconnection With U S WEST Communications, Inc.	)	UTILITY DIVISION DOCKET NO. D96.9.150 ORDER NO. 5949b

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ARBITRATION ORDER

Introduction and Procedural Background

On September 6, 1996, Western Wireless Corporation (Western) petitioned the Montana Public Service Commission (Commission) to arbitrate "open issues" related to its ongoing interconnection negotiations with U S WEST Communications, Inc. (U S WEST). Although Western is a provider of cellular telecommunications and not regulated by the Commission,[1] § 252(b)(1) of the Telecommunications Act of 1996 (Act or 1996 Act)[2] permits the incumbent local exchange carrier (LEC) or any other party to the negotiation of an interconnection agreement to petition the Commission to arbitrate any open issues that the parties have been

[1]Section 69-3-803(3), MCA, exempts providers of cellular communications and other wireless services from the definition of "regulated telecommunications service."

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of 47 U.S.C.).

unable to resolve voluntarily. The 1996 Act allows a party to file such petition between the 135th day and the 160th day (inclusive) after the incumbent LEC receives the request for negotiation. 47 U.S.C. § 252(b)(1). Western requested negotiation with U S WEST on March 29, 1996, and filed its petition for arbitration with the Commission on September 6, 1996, the 160th day after the request.

Western requested renegotiation of its existing interconnection contract with U S WEST. The 1996 Act permits renegotiation of existing contracts between an incumbent LEC and a Commercial Mobile Radio Service (CMRS) provider when compensation according to the existing contract for transport and termination charges is only paid by the CMRS provider to the LEC. 47 U.S.C. § 251(b)(5). Western, d/b/a "Cellular One," offers cellular communications throughout Montana pursuant to its Federal Communications Commission (FCC) radio license. According to 47 U.S.C. §§ 251(b)(5) and 252(d)(2)(A), compensation arrangements for transport and termination of calls which originate on the other carrier's network facilities must be mutual and reciprocal, with rates based on a reasonable approximation of the additional costs of terminating such calls. Under the parties' existing interconnection contract, U S WEST does not compensate Western. Thus, Western may renegotiate this contract pursuant to the Act.

In a scheduled work session held on September 17, 1996, the Commission voted to proceed in this arbitration with the Commission acting as the arbitration panel (arbitrator). The Commission appointed Karen Hammel, Commission staff attorney, to act as hearings officer for procedural matters; and limited intervention to the Montana Consumer Counsel (MCC). On September 18, the Commission issued a Notice of Commission Action advising of the action taken the preceding day and setting MCC's intervention deadline as the date required for U S

WEST's response to the Petition. The Hearings Officer conducted a scheduling conference on October 11, 1996, and issued a Procedural Order pursuant to the scheduling conference. The Commission granted late intervention to the MCC on October 16, 1996.

Western and U S WEST identified several issues in the petition and response thereto which they had been unable to resolve between themselves. These issues are: (1) the rate for interconnection and transport and termination; (2) the applicable rate for Western's switching facilities; (3) the effective date for implementing the new contract rates; (4) the percentage of U S WEST traffic that terminates on Western's network; and (5) the definition of "local" traffic and applicable rate for non-local traffic.

U S WEST filed two motions with its Response on October 1, 1996. One motion requested dismissal of the first issue identified by Western in its petition. The motion to dismiss that issue related to Western's assertion that the FCC's proxy rates must apply until the Commission could determine new interconnection rates. However, the issue of the appropriate rates could not be dismissed and, at a scheduled work session held on October 16, 1996, the Commission denied U S WEST's Motion to Dismiss. On October 18, 1996, the Commission issued a Protective Order pursuant to the second motion.

U S WEST's Response also contained an offer for the rates to be charged for interconnection and transport and termination. U S WEST based these rates on its own Total Element Long Run Incremental Cost studies (TELRIC studies[3]). Western filed a reply on October 16, 1996, stating that it accepted the proposed rates included in U S WEST's Response,

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[3]TELRIC is the FCC's terminology for a forward-looking replacement cost methodology that it mandated for the states to use in their arbitration proceedings. *See, e.g.,* Interconnection

and notifying the Commission that the issues had been narrowed by that agreement. U S WEST subsequently modified its proposal by increasing the accepted prices to recover a depreciation reserve deficiency on certain elements of the transport pricing. The revised prices were set forth in the October 28, 1996 prefiled testimony of U S WEST witness, James Hayhurst.

The arbitration hearing in this Docket was held on December 4, 1996. At that time, five arbitration issues remained unresolved, with the additional question whether U S WEST could add claimed depreciation reserve deficiency to the prices Western had previously accepted.

As stated above, this arbitration proceeding stems from the 1996 Act, which requires reciprocal compensation between interconnecting carriers. As part of a "trilogy" of FCC dockets to implement the 1996 Act, the FCC issued an order on August 8, 1996 in the first of these dockets. *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, FCC 96-325 (released August 8, 1996) (Interconnection Order). The FCC's Interconnection Order, *inter alia*, claimed jurisdiction over the pricing of intrastate services, an area that states have had jurisdiction over pursuant to section 152(b) of the Communications Act of 1934. *See, e.g.*, Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986). The FCC concluded that the 1996 Act permitted it to regulate intrastate interconnection between carriers, thus rendering Louisiana and similar decisions inapplicable to 47 U.S.C. §§ 251-253. *See, e.g.*, Interconnection Order, ¶ 97.

Order, ¶¶ 620, 672-732.

Numerous motions for reconsideration have been filed with the FCC and various United States Circuit Courts of Appeal since the issuance of the FCC Interconnection Order, some requesting a stay of the order. Although the FCC denied a stay, the United States Court of Appeals for the 8th Circuit[4] (8th Circuit) subsequently granted a stay on the basis of jurisdictional arguments made by some of the parties, including state commissions, claiming that 47 U.S.C. § 152(b) has not been superseded by the 1996 Act and that the FCC improperly asserted jurisdiction over intrastate matters. Order Granting Stay, slip op. (8th Cir.) (Oct. 15, 1996). The 8th Circuit's stay only relates to the pricing and "pick and choose" rules, not the entire Interconnection Order. On November 1, 1996, the Court partially lifted some sections of the stay which relate to CMRS providers.[5] The parties have modified or changed their arguments on some of the issues in this proceeding due to the appeal of the FCC's Interconnection Order and the pre-decision appellate process. The stay of the FCC's Interconnection Order issued by the 8th Circuit has some effect in this proceeding. We explain this in further detail in our discussion set forth below.

FINDINGS OF FACT AND ARBITRATION AWARD

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[4]The appeals filed in the several circuit courts were consolidated with the proceeding going forth in the 8th Circuit. *See* Iowa Utilities Board, et al., v. FCC, No. 96-3321 (and consolidated cases).

[5]The stay was lifted for sections 51.701, 51.702, and 51.717 of the FCC regulations.

Issue 1: Rate for Interconnection and the Transport and Termination of Traffic

1. The first unresolved issue identified for arbitration is the rate for interconnection and transport and termination of traffic going between Western's network and U S WEST's network. Western stated in its petition that U S West had not provided a TELRIC cost study during negotiations to support its proposed rates for interconnection and transport and termination of traffic. In its October 1, 1996 response to Western's petition, U S West provided "executive summaries" of cost studies, claiming that these cost studies comply with the TELRIC pricing model set forth in the FCC's Interconnection Order. U S West asked that the arbitrator adopt the proposed prices from these studies. On October 16, 1996, Western filed an acceptance of the U S WEST proposed rates for transport and termination of traffic, seemingly resolving the pricing issue relating to transport and termination of traffic.

2. However, in the prefiled testimony of U S WEST's witness James Hayhurst, filed on October 28, 1996, U S WEST revised the rate that it had proposed in its Response, proposing to increase the originally filed transport and termination rates by $.0024 per minute of use (MOU). The revised rates are higher than the rates proposed in the Response by approximately 58 percent and 127 percent for call termination and transport, respectively. U S WEST stated that the proposed increase in rates is for recovery of its "depreciation reserve deficiency."

3. A depreciation reserve deficiency is the difference between the actual book depreciation reserve and the theoretical reserve that would exist had forecasts of service lives and salvage values been entirely accurate over the life of the plant. U S WEST characterizes the depreciation reserve deficiency as "the historically under-depreciated, embedded investment" in its network. According to U S WEST, the TELRIC prices do not reflect this expense in the

provisioning of the services requested by Western and it is a major omission that should be corrected. U S WEST contends that with the stay of the FCC pricing rules by the 8th Circuit, interconnection prices should include recovery of this cost, claimed to be $45,600,000.

4. U S WEST proposed that the Commission allow recovery of the depreciation reserve deficiency on a per MOU basis over a five-year period. For the present, this recovery would be a cost component of rates assessed to Western for interconnection and would not be assessed to other services.

5. The pricing standard for transport and termination is set forth in § 252(d)(2) of the 1996 Act, which provides in pertinent part:

> (2) CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC--
> (A) IN GENERAL.--For the purposes of compliance by an incumbent [LEC] with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--
> (I) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
> (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

6. Western maintains that § 252(d)(2), does not allow U S WEST to recover this depreciation reserve deficiency through transport and termination charges. Western contends that the reserve deficiency is not a recoverable cost under the 1996 Act because the Act mandates the use of an “additional costs” pricing standard, which equates to the use of an incremental costing methodology to determine prices.

7. U S WEST disputes Western’s assertion that the additional cost language in § 252(d)(2) restricts the incumbent LEC to the use of an incremental costing method in determining prices for transport and termination. U S WEST argues that although the additional cost language may permit the use of forward-looking costs, the Act itself does not refer to any costing methodology, and further, that the Act does not requires a TELRIC method. U S WEST

also noted that the legislative history of the Act does not indicate that § 252(d)(2)(A) requires a TELRIC method.

8. U S WEST stated that the FCC recognized that the pricing standard under § 252(d)(2) of the Act is essentially the same as the pricing standard under § 252(d)(1), and that both pricing provisions permit U S WEST to recover the costs of providing the service of transporting and terminating the calls originating on Western's network. Section 252(d)(1) of the Act reads as follows:

> (d) PRICING STANDARDS.--
> (1) INTERCONNECTION AND NETWORK ELEMENT CHARGES.--Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--
> (A) *shall be*--
> *(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable),* and
> (ii) nondiscriminatory, and
> (B) may include a reasonable profit. (Emphasis supplied.)

9. Although U S WEST apparently agrees with the FCC's interpretation that the pricing standards for §§ 252(d)(1) and (2) of the Act are essentially the same, it does not agree with the FCC's conclusion that the "additional cost" standard permits only the use of forward-looking, economic cost-based pricing or TELRIC pricing. U S WEST contends that the Act's pricing standards do not prohibit the arbitrator from using embedded costs in setting rates. To support this contention, U S WEST relies on § 252(d)(1)(A)(I) which is emphasized in the quoted material in ¶ 8 above, asserting that the requirement that rates be based on costs would allow a state commission to establish rates using the embedded costs of the carrier.

10. For purposes of this proceeding only, the Commission concludes that it is not necessary to interpret the Act's pricing provisions. The dispute between the parties is U S

WEST's proposal to include recovery of the depreciation reserve deficiency in transport and termination rates. As explained below, the Commission further concludes that U S WEST may not recover any depreciation reserve deficiency in transport and termination rates at this time.

11. At the hearing Mr. Hayhurst was questioned about U S WEST's ability to include a depreciation reserve deficiency as a cost component of rates. Mr. Hayhurst admitted that before the Commission has allowed recovery of depreciation reserve deficiency in prior cases, it has conducted an inquiry into the magnitude of the deficiency as well as the appropriate amortization period. He agreed that generally the Commission allowed recovery of such deficiencies over the remaining life of the assets. He further admitted that the five-year amortization of the deficiency proposed in this Docket was not equal to the remaining life of the assets.

12. Mr. Hayhurst noted that the Commission had permitted U S WEST to recover expenses more rapidly in the past, and argued that this procedure was warranted for the depreciation reserve deficiency U S WEST has alleged in this proceeding. He testified that one of the two cases he knew of was the conversion of all step-by-step and No. 5 crossbar offices to electronic offices, with recovery over the three-year life of the project; the other was RTIP where the Commission permitted the amortization of aerial wire for rural service upgrades over a period of five years. However, Mr. Hayhurst agreed that generally, when an asset life is shortened, the reserve deficiency is recovered over the remaining life of the particular asset. The exceptions allowed in the two cited examples related to investment in particular assets used to replace outdated plant and the recovery of the company's investment in those assets only. These special circumstances differ significantly from U S WEST's requested recovery in this

proceeding which would permit U S WEST to recover depreciation reserve deficiency for all assets from a few services.

13. The Commission has the authority to determine whether a depreciation reserve deficiency exists and to determine the appropriate recovery period for such a deficiency. Such determinations involve other considerations not present in this arbitration as the Commission will have to apply a different standard for decision-making than is required for arbitration of unresolved issues according to the 1996 Act. Furthermore, U S WEST has not provided sufficient information in this Docket to enable the Commission to determine either the magnitude of its alleged deficiency or an appropriate amortization period. Because there is no support in the record for such recovery, U S WEST's request to recover this alleged cost in rate elements for local switching and tandem switching must be denied.

14. The Commission finds that the arbitration order should adopt the rates as proposed by U S WEST in its October 1, 1996 Response and subsequently accepted by Western. U S WEST may only recover a depreciation reserve deficiency if the Commission has determined that a depreciation reserve deficiency exists and that embedded costing is the appropriate cost model.

15. Moreover, the Commission finds that U S WEST's proposed assignment of costs to transport and termination rates in this Docket is inappropriate. To assign transport and termination costs, U S WEST took the entire reserve deficiency--which relates to all assets used by U S WEST to provide service--and assigned costs to transport and termination based on estimated annual intrastate local and tandem switched MOUs. When and if U S WEST is allowed to include recovery of a depreciation reserve deficiency in transport and termination

rates, U S WEST should isolate the assets used to provide transport and termination service and use the deficiency related to those assets to develop its costs.

16. In adopting the prices as proposed by U S WEST, the Commission makes no finding that it approves of U S WEST's TELRIC methodology or its results. U S WEST's cost studies could not be appropriately examined in this Docket and, therefore, the Commission cannot make findings as to the propriety of the studies, the methodology used, or the results derived. The Commission approves US WEST's prices as originally proposed because Western filed an agreement accepting these prices. Thus, the Commission's arbitrated resolution of this issue is based on the parties' voluntary resolution of prices to be used, the conclusion that depreciation reserve deficiency may not be added to that figure and included in the price, and no subsequent withdrawal by U S WEST of its TELRIC determination of costs. Therefore, the Commission will consider the rates agreed to by the parties to be a voluntarily negotiated term with respect to §§ 252(a)(1) and (e)(2).

Issue 2: Applicable Rate for Western's Switching Facilities.

17. The second issue identified for arbitration is whether Western's Mobile Telephone Switching Offices (MTSOs) are to be treated as end-office switches or tandem switches to establish the appropriate transport and termination prices for traffic originating on U S WEST's network and terminating on Western's network. The significance of this determination is that the tandem switching rate is higher than the end office rate.

18. Another carrier's switch may be the functional equivalent of the incumbent LEC's tandem switch based on the functions it performs and the geographic areas served by the switch. Western has four MTSOs in Montana which cover the entire state although access to them is not

available in all areas. U S WEST uses four tandem switches to serve end offices in many areas of Montana.

19. Western contends it should be compensated at the tandem switching rate based on its costs, the geographic area served by its switches, and the functionality of its switches. Western provided testimony that its MTSOs provide connectivity not only to Western's end-user customers, but also to long distance facilities, U S WEST facilities, and to the facilities of other carriers such as independent LECs. Western also cited its network "redundancy" which requires special hardware and software to manage the mobility of its customers. Western claims that these functions are equivalent to or greater than the functions provided by a U S WEST tandem switch.

20. U S WEST contends that Western's switch is functionally equivalent to an end-office switch and Western should be compensated at the end-office interconnection rate. U S WEST notes a disparity that would ensue if the tandem rate is applied to Western's MTSOs. Under the existing contract, when Western chooses to interconnect at a tandem, it pays both the tandem switching and transport element between the incumbent LEC's two switches and the end-office switching rates for a total price of .0245 cents per MOU. However, Western can choose to interconnect and deliver its traffic to a U S WEST end-office location and pay only the lower end-office switching charge (.0206 cents per MOU). U S WEST can only connect to Western's MTSO. U S WEST contends that Western is not entitled to compensation for tandem switches when it chooses to use U S WEST's tandem switches and U S WEST bears the tandem switching costs. U S WEST notes that on cross-examination, Western's witness Ted Benson admitted that the only time the routing functions of the MTSO are performed is in connection with a call

involving a Western customer.

21. Section 252(d)(2) of the 1996 Act, quoted in ¶ 5 above, provides guidance for determining appropriate rates for transport and termination. It states that a state commission shall not consider reciprocal compensation terms and conditions to be just and reasonable unless

> . . . such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier . . .[and the terms and conditions] determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

22. The FCC's Interconnection Order suggests that states may establish transport and termination rates that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In addition, it encourages state commissions to consider competitive carriers that utilize different technologies when determining the appropriate switching rate to use. The Interconnection Order provides in pertinent part:

> . . . [S]tates shall also consider whether new technologies (*e.g.*, fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

Interconnection Order, ¶ 1090. Similarly, § 51.711(a)(3) of the FCC's rules implementing the 1996 Act provides:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

This regulation is subject to the 8th Circuit's stay order and is not controlling here until and unless the result of the consolidated appeals permits the FCC to preempt traditional state jurisdiction of intrastate matters.

23. Although both parties placed orders from other jurisdictions in the record to support their position on this issue, all of these orders related to competitive land line LECs and none of the decisions involved a CMRS carrier. It is difficult to determine the functional equivalence between Western's MTSOs and U S WEST's tandems because their network architectures and technologies are different. However, the geographic areas served by Western's MTSOs seem to be at least as large as the areas served by U S WEST's tandems, and much larger than those served by U S WEST's end-office switches.

24. Ideally, rather than comparing Western's MTSOs with U S WEST's tandem switches, the Commission should determine transport and termination rates based on the specific costs incurred by each carrier or a reasonable approximation of the costs to terminate calls that originate on the other carrier's network. This would be more consistent with the language in the Act. However, in this proceeding, the record includes cost information for U S WEST's end office and tandem switches, but no specific information regarding Western's switching costs. Although Western's witness stated during the hearing that Western's costs were greater than U S WEST's, this assertion was not supported by any data. The record also contains no evidence that the end office rate would not adequately compensate Western for its call termination costs.

25. The Commission concludes that call termination on Western's network should be priced at U S WEST's end-office termination prices. This conclusion is based on testimony in the record which suggests that Western's switch, although capable of performing the same functions as a tandem switch, in fact does not function as such. Also persuasive to our conclusion is the fact that Western can connect directly to some of U S WEST's end-offices

without routing traffic through a tandem switch and, thus, can bypass the tandem and only pay the end-office rate for such calls.

Issue 3: Effective date of Reciprocal Compensation

26. Western presented the Commission with two issues regarding timing for the provision of reciprocal compensation by U S WEST: (1) the date on which U S WEST became obligated to compensate Western at the existing contract rate, and (2) the effective date of the arbitrated rates.

27. With regard to the first of these subissues, U S WEST initially took the position that reciprocal compensation was effective on September 30, 1996.[6] U S WEST has since argued that its obligation to Western for reciprocal compensation at the existing rates began November 1, 1996, the date the 8th Circuit modified its stay of the FCC rules. U S WEST bases this argument on ¶ 1094 of the FCC Interconnection Order, which states :

> Pending the successful completion of negotiations or arbitration, symmetrical reciprocal compensation shall apply with the transport and termination rate that the incumbent LEC charges the CMRS provider from the preexisting agreement applying to both carriers *as of the effective date of the rules we adopt pursuant to this order*. (Emphasis supplied.)

28. Western argued that § 51.717 of the FCC regulations requires reciprocal compensation beginning March 29, 1996, the date Western submitted its request to renegotiate its agreement with U S WEST.

29. The FCC's Interconnection Order discusses at length the comments received in the proceeding and its rationale for the regulations it adopts. The actual regulations resulting

[6] *See* U S WEST Communications, Inc.'s Motion to Dismiss, p. 4, Docket No. D96.9.150, filed with the Commission on October 1, 1996.

from the FCC's analysis have the force of law and are controlling here at this time because § 51.717, originally included in the 8th Circuit's stay, was one of the three sections as to which the Court lifted the stay in its November 1, 1996 Order. Section 51.717 provides:

> **Renegotiation of existing non-reciprocal arrangements.**
> (a) Any CMRS provider that operates under an arrangement with an incumbent LEC that was established before August 8, 1996 and that provides for non-reciprocal compensation for transport and termination of local telecommunications traffic is entitled to renegotiate these arrangements with no termination liability or other contract penalties.
>
> > (b) *From the date that a CMRS provider makes a request under paragraph (a) until a new agreement has been either arbitrated or negotiated and has been approved by a state commission, the CMRS provider shall be entitled to assess upon the incumbent LEC* the same rates for the transport and termination of local telecommunications traffic that the incumbent LEC assesses upon the CMRS provider pursuant to the pre-existing arrangement. (Emphasis supplied.)

Although the Interconnection Order says the effective date for reciprocal compensation at the existing contract rates is the effective date of the FCC's rules, the FCC's rule, § 51.717, provides otherwise. Section 51.717 clearly requires U S WEST to compensate Western according to the existing contract rate beginning on the date of Western's request and continuing until the date the Commission approves the new agreement (consisting of both negotiated and arbitrated terms).

30. The second unresolved subissue that relates to implementing reciprocal compensation is the effective date of the arbitrated rates. Western requested that the Commission make the rates, as well as the other arbitrated terms and conditions, effective with the issuance of the Commission's arbitration order in this proceeding. U S WEST proposed that the new rates should not be effective until the Commission approves the new agreement between the parties.

31. FCC regulation § 51.717 clearly controls the effective date of the arbitrated rates. It provides that existing contract rates apply reciprocally "until a new agreement has been either arbitrated or negotiated and has been approved by a state commission." The arbitrated rates will become effective on the date the Commission approves the parties' new agreement pursuant to the requirements of § 252 of the 1996 Act.

Issue 4: Percentage of U S WEST Traffic that Terminates on Western's Network

32. The issue of determining the amount or percentage of traffic that terminates on Western's network arises when Western is not able to ascertain, and U S WEST cannot identify, the point of origination of traffic that terminates on Western's network. A preliminary question is whether U S WEST must compensate Western for third-party originated traffic that transits U S WEST's network and terminates on Western's network. Section 252(d)(2)(A) of the 1996 Act provides in relevant part:

> (I) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier . . .

U S WEST contends that when it receives originating traffic from another local carrier, transports that traffic over its own network, and hands that traffic off for termination on the Western Wireless network, Western Wireless is not entitled to mutual compensation for such traffic, but must seek compensation directly from the other carrier. Western contends that in cases where U S WEST receives terminating compensation from the first carrier, U S WEST's position is unreasonable because it over-compensates U S WEST and denies Western Wireless fair compensation for the termination function it performs.

33. The statute is sufficiently clear on intermediate carrier responsibility for transport and termination costs. A carrier that transports third-party traffic has no obligation to compensate the terminating carrier under the statute because the call did not originate on the facilities of the transporting carrier, even if the originating carrier paid termination compensation to the transporting carrier. The entity entitled to the termination compensation is the terminating carrier and the party responsible for payment is the originating carrier. If the originating carrier pays the transporting carrier a termination fee, then it will either pay twice for the service or renegotiate its contract with the transporting carrier.

34. Both U S WEST and Western have proposed administrative factors for the percentage of traffic that U S WEST transports for another carrier and then terminates on Western's network, but does not originate. These factors are estimates for the actual percentage of traffic which neither party is able to provide. U S WEST asserted that its administrative factor for terminating traffic on Western's network should be 17 percent and Western argued that U S WEST's administrative factor should be 25 percent. This percentage, according to Western, is the result of subtracting 3 percent from the 28 percent indicated by its study,[7] and is a factor to exclude third party carriers. Both parties supported their respective administrative factors with traffic sampling information.

35. U S WEST stated that its 17 percent administrative factor is supported by a study done by U S WEST and another CMRS provider similar to Western. U S WEST further stated

[7]Western determined that a 25% proxy for determining the amount of compensable traffic for Western was appropriate. Western based its proxy upon actual traffic that terminates on its network, measuring the percentage of land to mobile traffic. Western's study includes calls that were not completed.

that the CMRS provider had the network sophistication to measure MOUs, conversation MOUs, and completed calls while excluding call attempts for traffic originating on U S WEST's network. Based upon the sampling, U S WEST and this CMRS provider negotiated an administrative factor of 17 percent.

36. When asked on cross-examination if U S WEST could provide the Commission with a copy of the study as a late-filed exhibit, U S WEST's witness Denyce Jennings, stated that U S WEST could not provide the study because it was the proprietary property of the CMRS provider. US West was requested to provide some proof that a study had been completed in the form of a late-filed exhibit. U S WEST's late-filed exhibit was a two-page document from Southwestco Wireless LP, a fax cover page and apparently a May traffic detail report for Phoenix, Tucson and Albuquerque with all statistical information obscured. The traffic information relied upon is predicated on a study of calling patterns of metropolitan area customers and not rural customers such as those served by Western in Montana.

37. U S WEST provided no substantive information in support of its 17 percent administrative factor. It did, however, submit seven amended interconnection contracts wherein the CMRS providers found the 17 percent factor acceptable. Each of these contracts expires December 31, 1996 and is in the process of being renegotiated. Because these contracts are soon to expire, they do not support a conclusion that the CMRS providers agree that the factor is reasonable. Western's contract does not expire until December 31, 1997.

38. As a late-filed exhibit Western provided the Commission with the traffic study it conducted at its Billings, Montana MTSO for the month of September 1996. Western used this study to develop its 25 percent administrative factor. Our examination of Western's traffic report

reveals that the only actual numbers in the report are the call completion counts[8] and their calculated percentages of total call completions. The report indicates that during the month of September there were 2,229,471 call completions at the Billings MTSO that were land to mobile, or 28.2 percent of all land line associated calls. This call completion number includes calls originating from all sources, including U S WEST, interexchange carriers and other LEC's. Because not all land to mobile calls completed at the Billings MTSO were originated by U S WEST, Western reduced the total percentage by 3 percent, to 25 percent.

39. Western reduced the percentage of land to mobile calls by 3 percent to reflect the fact that Western has several direct interconnection arrangements with other carriers. However, the 3 percent reduction does not include calls transiting U S WEST's system originated by other carriers. As previously concluded, pursuant to § 252(d)(2) of the Act, U S WEST must compensate Western only for calls originating on its system. Because U S WEST's compensation responsibility is limited to calls that originate on its system, Western's 25 percent administrative factor is too high.

40. Neither party has provided adequate information in support of its proposed administrative factor. Therefore, because we have concluded that Western's factor is too high, the Commission finds that it is reasonable to use U S WEST's proposed factor for a period of six months. During this six-month period, U S WEST and Western should perform a study to determine a more supportable administrative factor. The administrative factor should be revised annually until SS7 functions are fully implemented. These future studies and the initial traffic study should contain parameters acceptable to both parties until SS7 functions are implemented.

[8]This total includes land to mobile, mobile to land and mobile to mobile.

Issue 5: The Local Calling Area and Applicable Charges for Non-Local Traffic

41. The final unresolved issue presented for arbitration is the definition of the local calling area and applicable charges for non-local traffic. The significance of this issue is that Western's "local" traffic that terminates on U S WEST's network is subject to local transport and termination charges. Western calls that originate in one local calling area and terminate on U S WEST's network in another calling area are subject to U S WEST's switched access charges, which are much greater than local transport and termination charges. Therefore, the size of the local calling area to apply for Western will determine which interconnection charges apply for each call transported and terminated.

42. According to Western's petition, the new FCC regulations establish the local calling area with respect to CMRS providers as a Major Trading Area (MTA). Western's Montana operations constitute one MTA. Western argued that the location of its point of interconnection with U S WEST's network should serve as the defining point for whether a call is local or not. For example, if a Western to U S WEST call terminates in the same local calling area as its point of interconnection with U S WEST, then Western believes it should only have to pay U S WEST local transport and termination charges.

43. The location of the end user originating the call as well as the location of the end user to whom the call is terminated determine whether or not a call is local. For calls originating and terminating in Montana, the state has jurisdiction over the land line LECs and the FCC has jurisdiction over CMRS providers. The FCC determined that traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5) of the 1996 Act, rather than inter- and intrastate access charges. CMRS

traffic that crosses over into a different MTA is subject to switched access charges.

44. In prefiled testimony, Western stated that because U S WEST agreed that intra-MTA traffic is subject to local interconnection rates, not access rates, the definition of the local calling area and the applicable charges for non-local traffic were no longer disputed. However, in its testimony filed on October 28, U S WEST changed its position on this issue, arguing that since the FCC's rule that designated MTAs as local calling areas for CMRS providers had been stayed, the authority to define local calling areas resides with the Commission. Western noted that the stay of the controlling section was lifted on November 1, 1996, thus making the MTA the appropriate defining area for a local call for CMRS providers.

45. In its Rebuttal Testimony, U S WEST conceded that the stay was lifted, but argued that the Court indicated it had "serious doubts" that the 1996 Act gave intrastate pricing authority to the FCC, but argued that the Montana Commission has approval authority under Montana law over intrastate interconnection and switched access pricing. U S WEST also argued that Western must identify the percentage of traffic that originates in one MTA and terminates in another MTA, and to identify traffic that terminates over its interstate interexchange facilities so that the appropriate access charges can be applied.

46. In its post-hearing brief, Western argued that the law is clear that all CMRS calls originating and terminating within an MTA are deemed local for purposes of establishing applicable interconnection charges. Because the entire state of Montana is located within the same MTA, Western believes this issue has been resolved. According to Western, in the unlikely event that traffic originating in another MTA transits its network, it will report that traffic to U S WEST and pay any applicable access charges.

47. U S WEST argued in its post-hearing brief that although the stay was lifted from the FCC rule that defines the MTA as a local calling area for CMRS providers, the issue is still subject to the appeal in the 8th Circuit. U S WEST maintains that the FCC has unlawfully usurped states' intrastate pricing jurisdiction by attempting to define local calling areas for purposes of establishing interconnection charges. U S WEST urged the Commission to exercise its authority and adopt local calling areas consistent with those applicable to other telecommunications providers in Montana.

48. If the Commission adopts the MTA as Western's local calling area, U S WEST suggested using a 5 percent administrative factor for access on interstate traffic. If the Commission determines Western's calling area is the same as U S WEST's, U S WEST recommended using 52 percent as the administrative factor for access charges.

49. U S WEST further stated that under the parties' existing contract, it receives no access revenues for interexchange traffic that Western originates or terminates on its own network. According to U S WEST, access charges were designed to promote low local exchange rates and universal service objectives. U S WEST maintains that there is no basis to exclude Western from the requirement to contribute for its use of the public switched network. U S WEST claims that as long as switched access charges are used for the support of the local network, they are appropriate for calls terminating on the network regardless of whether the origin of the call is from a wireless or a wireline subscriber.

50. The Commission agrees with Western that the MTA should define Western's local calling area and, therefore, Western to U S WEST calls that originate and terminate in the same MTA should be subject to local transport and termination rates, not access charges.

Section 51.701 of the FCC's local interconnection rules addresses the appropriate scope of transport and termination. Although the rule was originally stayed by the 8th Circuit Court, the Court subsequently lifted the stay, and the rule is currently in effect. The relevant part of the rule states:

> (b) *__Local telecommunications traffic__*. For purposes of this subpart, local telecommunications traffic means:
>
> (1) telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area established by the state commission; or
>
> (2) telecommunications traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

Section 51.701 (b) of the FCC's Local Interconnection Rules. As local exchange competition develops, local calling areas will likely provide carriers with a competitive tool for differentiating themselves from other carriers. Western's network and the technology used differs from U S WEST's. Western's local calling areas are relatively large when compared to U S WEST's local calling areas, and there is no more reason to subject Western's customers to U S WEST's local calling area boundaries than there is to require other new entrants to use U S WEST's local exchange calling areas.

51. The Commission agrees that historically access charges may have been used to derive extraordinary contributions towards the recovery of U S WEST's revenue requirement, thereby allowing lower rates, but this arrangement may not be sustainable in a more competitive environment. The FCC's ongoing "trilogy" of local competition, universal service and access

charge reform dockets should provide an opportunity for U S WEST to reconcile its various revenue recovery mechanisms with the transition to competition in local exchange markets.

52. The Commission agrees with U S WEST that in determining the origin of a call from Western's network, the point of origination should be the cell site where the call originates, not the point where the call enters U S WEST's network. If the point where the call enters U S WEST's network is used to determine the origin, it is likely that little or none of Western's traffic as well as the traffic from AT&T and other interexchange carriers would be subject to access charges.

53. It is not clear that U S WEST will know in all cases when a call from a Western end user to a U S WEST end user originates from outside the MTA. It is also likely that it may be difficult for Western to know with certainty the customer's specific location relative to the MTA boundary at the start of all calls. Therefore, the Commission accepts US West's proposal to use a 5 percent administrative factor to apply to Western's traffic for access charges. Western should perform a study (possibly in conjunction with the study to determine the administrative factor discussed above) to determine an appropriate "toll factor" to use as a surrogate for the percentage of actual Western-U S WEST calls that are subject to access charges. Alternatively, Western and U S WEST can develop the technical means by which Western provides the necessary information regarding the originating location of all calls handed off to U S WEST by Western. This information should be in a form that can be used by U S WEST.

Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST is a public utility offering regulated telecommunications

services in the State of Montana. Section 69-3-101, MCA.

2. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

3. Western Wireless Corporation, d/b/a "Cellular One," provides cellular communications in Montana. Cellular communications providers are not regulated by the Commission. Section 69-3-804, MCA.

4. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally*, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (amending scattered sections of the Communications Act of 1934, 47 U.S.C. §§ 151, *et seq.*). The Montana Public Service Commission is the state agency in Montana charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

5. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

6. Western Wireless is entitled to reciprocal and mutual compensation for transport and termination of telecommunications that originate on U S WEST's network facilities and terminate on Western's network facilities. 47 U.S.C. §§ 251(b)(5) and 252(d)(2).

7. Western may renegotiate its existing interconnection contract with U S WEST to provide for reciprocal compensation from U S WEST. 47 U.S.C. § 251(b)(5). The 1996 Act permits Western to petition this Commission to arbitrate any open issues in the negotiation of this contract, according to the parameters included in 47 U.S.C. § 252(b)(1).

8. Arbitration by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. § 252. Section 252(b)(4)(A) limits the Commission's consideration of a petition for arbitration to the issues set forth in the petition and the response and to imposing appropriate conditions as required to implement § 251(c) upon the parties to the agreement. Section 252(b)(4)(C) requires the Commission to conclude the resolution of any unresolved issues not later than December 29, 1996, nine months after the date on which U S WEST received Western's request for arbitration.

Arbitration Order

THEREFORE, based upon the foregoing, it is ORDERED that the issues presented for Commission arbitration are resolved as set forth above and as follows:

1 that the rates for interconnection and transport and termination of traffic shall be the rates proposed by U S WEST in its response and accepted by Western;

2 that U S WEST may not at this time recover its alleged depreciation reserve deficiency in transport and termination charges;

3 that Western's Mobile Telephone Switching Offices (MTSOs) are to be treated as end-offices for purposes of establishing the appropriate transport and termination prices for traffic originating on U S WEST's network and terminating on Western's network;

4 that the effective date of the rates established in the new interconnection

agreement between U S WEST and Western is the date the Commission approves the agreement executed by the parties, including the arbitrated terms and conditions and the negotiated terms and conditions;

5 that Western is entitled to reciprocal compensation at the existing contract rate from March 29, 1996, the date it requested renegotiation of its existing contract, until the date the new agreement takes effect;

6 that a 17 percent administrative factor is reasonable for the amount of traffic terminating on Western's network and shall be used for six months;

7 that the parties shall conduct a study using mutually agreeable parameters to determine a more supportable administrative factor to estimate the amount of traffic terminating on Western's network for use after the first six months of the new contract period and shall revise the administrative factor annually until SS7 functions are fully implemented;

8 that the local calling area is the Major Trading Area (MTA) established by the FCC for CMRS providers, and in this case is the State of Montana;

9 that a five percent administrative factor, or "toll factor," is reasonable and shall apply to Western's traffic for use as a surrogate for the percentage of actual Western to U S WEST calls that are subject to access charges; and

10 that U S WEST and Western shall either perform a study to determine the appropriate "toll factor" for access charges or develop the technical means by which Western provides the necessary information regarding the originating location of all calls handed off to U S WEST by Western.

IT IS FURTHER ORDERED that the completed interconnection agreement containing the new terms and conditions of interconnection and transport and termination be filed with the Commission for approval within 15 days of service of this ORDER.

DONE AND DATED at Helena, Montana, this 27th day of December, 1996, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

NANCY MCCAFFREE, Chair

DAVE FISHER, Vice Chair

BOB ANDERSON, Commissioner

DANNY OBERG, Commissioner

BOB ROWE, Commissioner

ATTEST:

Ann Purcell
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.

OPINION OF COMMISSIONER ROWE

Based on a comparison of the geographic areas served and the functionalities of the switches, I believe Western's Mobile Telephone Switching Office more closely resembles a U S WEST tandem switch than an end-office switch. The comparison is difficult, and the Commission's conclusion is well-reasoned. As the Order notes, a comparison of costs incurred by each carrier, if provided, would have been a preferable basis for making the determination.

RESPECTFULLY SUBMITTED this 27th day of December, 1996.

BOB ROWE, Commissioner